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<b>Appeal Reference:</b>	2021/E0051
<b>Appeal by:</b>	Mr John Spratt
<b>Appeal against:</b>	The refusal of a Certificate of Lawfulness of Proposed Use of Development
<b>Proposed Development:</b>	Commencement of development of X/2010/0034/F in accordance with approval.
<b>Location:</b>	Land adjacent and north of 27 Ballybeen Road, Comber.
<b>Planning Authority:</b>	Ards and North Down Borough Council
<b>Application Reference:</b>	LA06/2021/0150/LDP
<b>Procedure:</b>	Written representations and Commissioner's site visit on 16 <sup>th</sup> February 2023
<b>Decision by:</b>	Commissioner Kenneth Donaghey, 16 <sup>th</sup> March 2023

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## Decision

1. The appeal is dismissed.

## Reasons

2. The application for a Certificate of Lawfulness of Proposed Use or Development (CLOPUD) was received by the Council on 10<sup>th</sup> February 2021, in accordance with Section 170 of the Planning Act (Northern Ireland) 2011 (the Act). This appeal was made under Section 173 of the Act against the Council's refusal of the application.
3. Section 170 of the Act makes provision for the issue of a CLOPUD; Section 170(1) states that ' if any person wishes to ascertain whether – (a) any proposed use of buildings or other land; or (b) any operations proposed to be carried out in, on, over or under land, would be lawful, that person may make an application for the purpose to the appropriate council specifying the land and describing the use or operations in question. Section 170 (2) indicates that if, on an application under this section, the Council is provided with information satisfying it that the use or operations described in the application would be lawful if instituted or begun at the time of the application, it must issue a certificate to that effect, and in any other case it shall refuse the application.
4. Planning permission X/2010/0034/F was granted on 14<sup>th</sup> April 2010. The main issue in this appeal is whether development as approved by this planning permission has lawfully commenced to allow the completion of the dwelling. Whilst the works at the site are existing, through the submission of a CLOPUD the appellant has sought certification to demonstrate the approval granted under X/2010/0034/F can be lawfully completed.

5. The Council having considered the submitted information refused to certify that planning permission X/2010/0034/F has lawfully been implemented. Planning permission, X/2010/0034/F, for the change of house type to previously approved farm retirement dwelling (X/2004/1658/O & X/2008/0827/RM) was granted full planning permission on 14<sup>th</sup> April 2010. Condition 1 of this approval stated that the development “shall be begun before the 14<sup>th</sup> January 2011”. This is the critical date by which the development should have commenced.
6. X/2008/0827/RM was approved on the 14<sup>th</sup> January 2009 and allowed the appellant two years to implement the approval. In adding condition 1 to the change of house type application (X/2010/0034/F), the Council sought to ensure that the overall time period for commencement of the development as stated on the initial grant of approval (X/2004/1658/O & X/2008/0827/RM) was not extended. The appellant stated that granting the change of house type application with such a short time period for implementation amounted to administrative unfairness. This condition was not appealed at the time of the approval being issued. Its fairness or otherwise is not a matter which is subject to this appeal.
7. This appeal relates to an approval under the Planning (Northern Ireland) Order 1991 (the 1991 Order), and it is therefore necessary I consider the matters in the context of the prevailing legislation at that time. Article 34 of the 1991 Order states that every permission granted is subject to the condition that the development to which it relates must be begun within; five years of the date on which the permission is granted; or other such period (whether longer or shorter) as the Department considers appropriate.
8. Article 36 of the 1991 Order sets out how Article 34 is to be interpreted it states that development is taken to be begun on the earliest date on which any of the operations specified in subsections (a) to (d) comprised in the development begins to be carried out. The approved development includes the erection of buildings. Therefore, Article 36(1) (a) applies in this case. It then must be determined if the works undertaken by the appellant involved any work of construction in the course of the erection of the buildings.
9. The appellant provided the following evidence to demonstrate that the works undertaken at the site constituted a lawful commencement of approval X/2010/0034/F: -
  - An invoice from WM Contracts which is dated 30<sup>th</sup> December 2010. This receipt is for works undertaken on the 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> 15<sup>th</sup>, and 16<sup>th</sup> of November 2010 and 16<sup>th</sup> December 2010. This invoice details the hire of a digger rock breaker for 20 hours, the hire of a 13-ton Hitachi for 27 ½ hours, hire of a tractor and dump trailer for 27 ½ hours and their delivery and collection on a low loader. The receipt also refers to the supply of a large quantity of type 3 stone.
  - A letter from WM Contracts, dated 28<sup>th</sup> January 2020, which states that the invoice relates to work carried out during November 2010 on the appeal site with a view to the development commencing. Works carried out include breaking rock, levelling the site and creating an access and laneway in accordance with the planning approval.

- A copy of part of the case officers report for X/2010/0034/F which refers to X/2002/0811/O and X/2007/0398/RM. This report indicated that the approval 'is started'. No further information is provided in the report in relation to commencement.
  - A copy of part of the case officers report for X/2015/0059 which contains a google earth image which dated April 2011.
  - Three further google earth images of the site taken around April 2011. These images show mounds of earth which have been excavated and stored at the site.
10. In addition to the evidence provided by the appellant, the Council has provided Building Control records of visits to the site which range from 20<sup>th</sup> May 2011 to 27<sup>th</sup> November 2011. These records refer to various visits to the site. Records indicate that foundations were excavated at the site on the 25<sup>th</sup> May 2011 and that concrete foundations were present at the site on the 27<sup>th</sup> May 2011. The appellant does not dispute that this was after the critical date for commencement of the development.
  11. The appellant argues that site levelling, breaking rock, constructing the access and hardstanding constitutes works of construction in the course of the erection of the buildings. The evidence provided by the appellant details an invoice for the hire of the equipment required to complete this work. The letter which accompanies this invoice elaborates that this work was carried out by WM Contracts with the view to the commencement of X/2010/0034/F in November 2011. It is not disputed that the works referred to were carried out at the time stated by the appellant. The excavation of the site, the levelling of the site, breaking of rock, laying of hardcore and formation of an access are all works which have been undertaken as site preparation they are not works of construction in the course of the erection of the approved building.
  12. The appellant has referred to the Section 56 (4) of the Town and Country Planning Act 1990. This is not legislation which is applicable to this jurisdiction. The appellant has also referred to Development Management Practice Note 03 – The Meaning of Development and the Requirement for Planning Permission, to demonstrate that the works which have been undertaken at the site represent development as set out within Section 23 of the Planning Act 2011. The appellant then argues if the works carried out on site constitute development, then they should represent the commencement of development. The meaning of development is a much broader scope than the application of Article 36 (1) (a) of the 1991 Order. The applicable requirement as clearly stated in the 1991 Order is 'any work of construction in the course of the erection of the buildings.'
  13. Whilst the appellant has provided various statutory definitions of what constitutes construction, these are specific to the application of the Construction Design and Management Regulations 2015. This definition is of limited assistance in the application of the 1991 Order.
  14. The excerpt from the case officers report associated with X/2010/0034/F refers to the development as granted by X/2004/1658/O & X/2008/0827/RM as being started. No supporting justification is provided in this report by the planning officer.

It is acknowledged that some works commenced at the site prior to the critical date. However, I have considered that they do not amount to construction works in the course of erection of a building as required by the 1991 Order.

15. Additionally, the appellant provided two legal articles to argue that the works undertaken at the site represent commencement of development. The article by W & S Law refers to commencement as it is referred to in the Town and Country Planning Act 1990 and as such is of limited assistance in applying the 1991 Order. The Town and Country Planning Act 1990 has a significantly looser approach to commencement than the 1991 Order. Furthermore, the legal advice note by Cleaver, Fulton, Rankin, is public advice from a private law firm published in 2010. It does not engage with the specific wording of the 1991 Order but rather focusses on the view that a material operation is required to commence a planning approval. This note also accepts that a material operation will vary on a case-by-case basis. This advice note is generic in its approach and does not assist in determining the specific nature of this appeal.
16. The appellant also argues that the planning gain of allowing a partially erected structure to be fully completed should be considered. The appellant is of the view that as there is no demonstrable harm in completing the dwelling on site, it should be allowed. The appellant made an application for a CLOPUD under Section 170 of the Planning Act. Matters of planning gain are not a determining factor in the consideration of the lawfulness of development.
17. All in all, I am not satisfied that the evidence presented allows me to conclude that the works which were carried out prior to the 14<sup>th</sup> January 2011 constitute works of construction in the course of erection of the buildings as required by Article 36 (1) (a) of the 1991 Order. As such the Council's refusal to certify the development has lawfully commenced is justified. The appeal is dismissed.

This decision is based on drawing 01, a site location plan at 1:1250, which was received by the Council on the 10<sup>th</sup> February 2021.

**COMMISSIONER KENNETH DONAGHEY**

**List of Documents**

Planning Authority:-	"A1" – Written Statement of Case (Ards and North Down Borough Council) "A2" – Rebuttal Statement (Ards and North Down Borough Council)
Appellant:-	"B1" – Written Statement of Case and Appendices (GT Design) "B2" – Rebuttal Statement (GT Design)